No. 85-140

(6)

Supreme Court, U.S.
FILED
DEC 17 1985
JOSEPH F. SPANIOL, JR.
CLERK

In The

Supreme Court of the United States

October Term, 1985

MICHAEL J. BOWERS,
ATTORNEY GENERAL OF GEORGIA,
Petitioner,

v.

MICHAEL HARDWICK, AND
JOHN AND MARY DOE,
Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

BRIEF OF PETITIONER MICHAEL J. BOWERS ATTORNEY GENERAL OF GEORGIA

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December 19, 1985

COCKLE LAW BRIEF PRINTING CO., (800) 835-7427 Ext. 333

51 pp

QUESTIONS PRESENTED

I. Whether the Court of Appeals erred in concluding that *Doe v. Commonwealth's Attorney for the City of Richmond,* 425 U.S. 901 (1976), *aff'g* 403 F.Supp. 1199 (E.D.Va. 1975), which upheld the constitutionality of Virginia's sodomy statute, does not constitute precedent binding upon lower federal courts.

II. Whether the Court of Appeals erred in concluding that Georgia's sodomy statute infringes upon the fundamental rights of homosexuals and in requiring the State of Georgia to demonstrate a compelling state interest in order to support the constitutionality of the statute.

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OPINION BELOW

The opinion of the Court of Appeals for the Eleventh Circuit which declared that this Court's summary affirmance in *Doe v. Commonwealth's Attorney for the City of Richmond*, 403 F.Supp. 1199 (E.D.Va. 1975), *aff'd*, 425 U.S. 90 (1976), and which concluded that Georgia's sodomy statute infringes upon Respondent Hardwick's constitutional right of privacy, appears in the Appendix to the Petition for the Writ of Certiorari [hereinafter Cert. App.] at 5 through 35 (Cert. App. 5-35), and is reported at 760 F.2d 1202 (11th Cir. 1985).

The opinion of the District Court for the Northern District of Georgia, which upheld the constitutionality of

Georgia's sodomy statute, and which appears in the Joint Appendix at 17 through 19, is not reported.

JURISDICTION

The judgment of the Court of Appeals for the Eleventh Circuit was entered on May 21, 1985. A timely suggestion for rehearing en banc was filed on May 30, 1985, and denied on June 13, 1985. The petition for a writ of certiorari was filed on July 25, 1985, and the writ was granted on November 4, 1985. This Court's jurisdiction is invoked under 28 U.S.C. § 1254(1) (1982).

STATUTORY PROVISION INVOLVED

Official Code of Georgia Annotated, § 16-6-2(a) (1984):

> A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another.

STATEMENT OF THE CASE

Respondents, Michael Hardwick and John and Mary Doe, filed their complaint in this case on February 14, 1983. Hardwick alleged that he is a practicing homosexual

who regularly engages in private homosexual sodomy, and that he will do so in the future. The Does alleged that they are lawfully married and have had the ambition to engage in activities proscribed by the Georgia sodomy statute, O.C.G.A. § 16-6-2 (1984). The Respondents, in seeking declaratory and injunctive relief, claimed that the statute violated their right of privacy under the First, Third, Fourth, Fifth, Ninth, and Fourteenth Amendments to the United States Constitution, and that it violated their rights to due process of law, was unconstitutionally overbroad, and denied them their freedom of expression and association. (Joint Appendix at p. 6).

Each Defendant, including Petitioner Bowers, filed separate motions to dismiss. The district court, in an order entered by the Honorable Robert H. Hall, dismissed the complaint as to the Does on the basis of their lack of standing. As to Hardwick, the complaint was dismissed on the ground that all of his constitutional claims had been rejected by this court in *Doe v. Commonwealth's Attorney for the City of Richmond*, 425 U.S. 90 (1976), *aff'g* 403 F.Supp. 1199 (E.D.Va. 1975). (Joint Appendix at p. 19).

Respondents appealed Judge Hall's decision to the United States Court of Appeals for the Eleventh Circuit and on May 21, 1985, in an opinion authored by the Honorable Frank M. Johnson, Circuit Judge, a majority of the panel found (1) that Hardwick possessed sufficient standing to pursue the action, while the Does lacked standing; (2) that this Court's summary affirmance in *Doe v. Commonwealth's Attorney, supra,* is not binding precedent; and (3) that Georgia's sodomy statute infringes upon Hardwick's fundamental right of privacy and association and consequently the State of Georgia would be required

upon the trial of this case to establish the existence of a compelling state interest in proscribing consensual homosexual sodomy in order to validate the statute. (Cert. App. at 12-26).

The Honorable Phyllis A. Kravitch, Circuit Judge, filed a separate opinion concurring in part with the majority panel decision but dissenting from the majority conclusion that *Doe v. Commonwealth's Attorney* is not binding on lower federal courts. (Cert. App. at 26-35).

On May 30, 1985, a suggestion for rehearing en banc was filed on behalf of Petitioner Bowers and was denied on June 13, 1985.

The Petition for a Writ of Certiorari was filed with this Court by Petitioner Bowers on July 25, 1985, and the writ was granted on November 4, 1985.

SUMMARY OF ARGUMENT

The Court of Appeals for the Eleventh Circuit has failed to follow binding precedent of this Court in the case of *Doe v. Commonwealth's Attorney*. While the Court of Appeals recognized that a summary affirmance by this Court has binding precedential effect, *Hicks v. Miranda*, 422 U.S. 332, 344-45 (1975), it erroneously concluded that *Doe* is not binding since this Court could have approved the result reached by the District Court in *Doe* without considering the substantive constitutional issues because the Plaintiffs in *Doe* were perceived by the Court of Appeals as lacking sufficient standing to sue. *Hardwick v. Bowers*, 760 F.2d 1202, 1207 (11th Cir. 1985) (Cert. App. at 14).

In addition, the Court below erroneously concluded that there had been subsequent doctrinal developments which would release lower federal courts from the binding effects of *Doe,* permitting the lower courts to reach their own conclusions as to whether a fundamental right to engage in homosexual sodomy exists under the constitution.

In arriving at these conclusions, the court below made unwarranted assumptions and misconstrued prior precedents of this Court relating to the efficacy of its summary decisions.

Moreover, the court below seriously erred in judicially creating a fundamental right of privacy to engage in homosexual sodomy, and by finding constitutional protection for this perceived right. Furthermore, the court below erroneously concluded that the act of homosexual sodomy proscribed by Georgia statute violates Hardwick's right of intimate association protected by the Ninth Amendment and perceptions of fundamental fairness embodied in the due process clause of the Fourteenth Amendment. These erroneous conclusions are unsupported by any previous decisions of this Court, the textual content of the Constitution itself, or any adherence to the concept that such rights that can be deemed fundamental must be rooted in traditional values and encompass only those rights "implicit in the concept of ordered liberty." *Paris Adult Theatre I v. Slaton,* 413 U.S. 49, 65 (1973); *Palko v. Connecticut,* 302 U.S. 319, 325 (1937).

ARGUMENT

I. The Court Below Erroneously Concluded That Doe v. Commonwealth's Attorney Does Not Constitute Supreme Court Precedent Binding Upon Lower Federal Courts.

In *Doe v. Commonwealth's Attorney for the City of Richmond*, 403 F.Supp. 1199 (E.D.Va. 1975), a three judge district court upheld the constitutionality of Virginia's sodomy statute against claims that the statute violated due process of law, freedom of expression, and the right of privacy as it related to homosexual conduct and concluded in plain and unequivocal language that the right of privacy recognized in *Griswold v. Connecticut*, 381 U.S. 479 (1965), and its progeny does not extend to private consensual homosexual sodomy. The district court further found that the State has a legitimate interest in proscribing such conduct, rationally related to the suppression of moral delinquency and crime. On appeal, the district court's decision was summarily affirmed by this Court without opinion. 425 U.S. 901 (1976).

Petitioner Bowers, in the case sub judice, moved the United States District Court for the Northern District of Georgia to dismiss the present action brought by Michael Hardwick and John and Mary Doe, based upon this Court's summary affirmance in *Doe v. Commonwealth's Attorney*. The District Court concluded that *Doe* was binding precedent on the issue and rendered judgment accordingly. (Joint Appendix at 18).

The Court of Appeals for the Eleventh Circuit, however, determined that it was free to draw its own conclusions as to whether a right of privacy exists which would

protect Michael Hardwick and others who practiced consensual sodomy from state interference, and held that *Doe* was not binding since this Court ". . . could have approved the result reached by the District Court without addressing the constitutional issues because the Plaintiffs plainly lacked standing to sue." *Hardwick*, 760 F.2d at 207 (Cert. App. at 14).

The Court of Appeals further found that even if this Court had addressed the merits at issue in *Doe*, subsequent "doctrinal developments" have authorized independent exercise of judgment by the lower courts in this area.

It is urged that the Court below seriously erred in reaching these conclusions in order to evade *Doe v. Commonwealth's Attorney.*

Unquestionably, a summary affirmance by this Court is a decision on the merits and therefore a binding precedent. As Justice Brennen once observed, "votes to affirm summarily are votes on the merits of the case. . . ." *Ohio ex rel. Eaton v. Price*, 360 U.S. 246, 247 (1959), *quoted in Hicks v. Miranda*, 422 U.S. 332, 344 (1975). In *Hicks* this Court went on to say:

> [T]he lower courts are bound by summary decisions by this court 'until such time as the court informs [them] that [they] are not.' [Cit. omitted.]

Id. at 344-45. In a later decision, this Court instructed:

> Summary affirmances and dismissal for want of a substantial federal question without doubt reject the specific challenges presented in the statement of jurisdiction and do leave undisturbed the judgment appealed from. They do prevent the lower courts from

> coming to opposite conclusions on the precise issues presented and necessarily decided by those actions.

Mandel v. Bradley, 432 U.S. 173, 176 (1977). *See also Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979); *Washington v. Confederated Bands and Tribes*, 439 U.S. 463, 476 n. 20 (1970).

A. Standing Was Not An Issue Presented Or Necessarily Decided in Doe v. Commonwealth's Attorney.

As mentioned in Circuit Judge Kravitch's dissent in the court below, the jurisdictional statement before this Court in *Doe v. Commonwealth's Attorney* mentioned only the substantive constitutional issues involved and decided by the United States District Court for the Eastern District of Virginia.[1] Neither the decision by the district court nor the jurisdictional statement before this Court even alluded to standing as an issue, indicating that the *Doe* plaintiffs had been found to have sufficient standing. Thus, it is urged that the standing issue raised by the Court of Appeals below would have been at the very most a question which "merely lurk[ed] in the record," *Webster v. Fall*, 266 U.S. 507, 511 (1925), and which would not have been resolved by this Court. *Illinois State Bd. of Elections v. Socialist Workers Party*, 440 U.S. 173, 183 (1979). Thus, the Court of Appeals, as did Professor Tribe in his trea-

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[1]The question presented in Doe's jurisdictional statement was "whether Virginia Code Section 18.1-212, as applied to sexual activity between consenting adults in private, violated appellants' constitutional rights to privacy, to due process of law, and to the equal protection of the laws, under the First, Fourth, Fifth, Ninth and Fourteenth Amendments to the Constitution." Jurisdictional Statement, *Doe v. Commonwealth's Attorney*, Sup. Ct. Docket # 75-896, October Term 1975.

tise, *American Constitutional Law*, at 943 (1978), erroneously inferred the resolution of an issue which was neither "presented" nor "necessarily decided" by this Court. *Mandel v. Bradley*, 432 U.S. 173, 176 (1977). Such an inference drawn by the court below was neither warranted nor permitted. *Illinois State Bd. of Elections*, 440 U.S. at 183.

Judge Kravitch's dissent also observed that if this Court had decided *Doe v. Commonwealth's Attorney* based upon a purported lack of standing of the Plaintiffs, this Court would have dismissed the appeal rather than rendering a summary decision on the merits, "whether the lack of standing was the result of Article III case-or-controversy considerations, or of purely prudential concerns." *Hardwick*, 760 F.2d at 1214 (Kravitch, J., dissenting) (Cert. App. at 30). *See Warth v. Seldin*, 422 U.S. 490, 498 (1975) ("In its constitutional dimension, standing imports justiciability: whether the Plaintiff has made out a 'case or controversy' between himself and the Defendant within the meaning of Art. III. This is the threshold question in every federal case, determining the power of the Court to entertain the suit."); *Poe v. Ullman*, 367 U.S. 497, 509 (1961) (dismissal of appeal because of prudential standing considerations).

The majority opinion in the court below attempted to show that this Court does not always dismiss appeals where there is a lack of standing by citing *Rizzo v. Goode*, 423 U.S. 362 (1976), and *O'Shea v. Littleton*, 414 U.S. 488 (1974). In both of these cases, however, this Court *reversed* lower appellate decisions which had erroneously found standing to exist. In such circumstances, the dismissal of an appeal to this Court would have presump-

tively left the erroneous decision in effect absent some direction by this Court requiring the lower court to vacate its judgment. No case was cited by the majority below in which this Court *affirmed* a lower court's dismissal on the *merits*, basing its affirmance upon finding of a lack of standing of the plaintiffs to sue.

While the majority of the court below also cited *Metromedia, Inc. v. San Diego*, 453 U.S. 490, 499 (1981), for the proposition that summary dispositions by this Court extend only to "the precise issues presented and necessarily decided by those actions," the Court specifically noted in that case that the Supreme Court of California had been "quite right in relying on our summary decisions as authority for sustaining the . . . ordinance against First Amendment attack." *Id.* at 500, *citing Hicks v. Miranda, supra.* The Court went on to note that such summary dispositions certainly do not have the same authority in *this Court* as do decisions after plenary consideration. 453 U.S. at 400. This observation indicates clearly, however, that lower courts may not look upon such summary decisions in the same manner as this Court. They are and should be bound by those decisions until the Court informs them that they are not. *Hicks v. Miranda* 422 U.S. at 345-46, *quoting Doe v. Hodgson*, 478 F.2d 537, 539 (2nd Cir. 1973), *cert. denied*, 414 U.S. 1096 (1973). It is suggested that if there is to be stability in the federal judicial system, doubts as to the binding effect of this Court's summary decisions should be resolved in favor of their continuing efficacy. *See Hutto v. Davis*, 454 U.S. 370, 375 (1982). As Circuit Judge Bork indicated in *Dronenberg v. Zech*, 741 F.2d 1388 (D.C.Cir. 1984), it certainly would be unwise for a lower federal court to distinguish a precedent

of the Supreme Court "on the speculation that it might possibly have had something else in mind." *Id.* at 1392. *See also Baker v. Wade,* 769 F.2d 289, *reh'g denied,* 774 F.2d 1287 (5th Cir. 1985) (en banc). It is submitted that the court below has erroneously engaged in such speculation.

B. There Have Been No Subsequent Doctrinal Developments Since Doe.

The majority below found two actions by this Court constituted "doctrinal developments" which relieved it of any burden to follow the summary affirmance in *Doe.* The first "action" appeared in *Carey v. Population Services International,* 431 U.S. 678 (1977), in which it was held, *inter alia,* that states could not prohibit the sale of non-prescription contraceptives to adults by others than licensed pharmacists. The precise "action" referred to by the court below was a reference in two footnotes in that decision that the extent to which the Constitution prohibits state regulation of private consensual sexual behavior has not definitely been answered. *Id.* at 688 n. 5, 694 n. 17.

The second "action" by this Court was its dismissal of certiorari in *New York v. Uplinger,* — U.S. —, 104 S.Ct. 2332 (1984). In that case, the New York Court of Appeals had invalidated a statute prohibiting loitering in public places for the purpose of engaging in or soliciting "deviate sexual behavior." The majority of the court below concluded that this Court's grant of certiorari in *Uplinger* was an indication that this Court was prepared to address the constitutionality of state statutes involving sodomy.

It is urged that the court below has overreached in its efforts to evade *Doe,* and its conclusions with respect to purported doctrinal developments cannot be objectively supported. This is due, in part, to what is perceived by Petitioner as the compounding of an error first committed in *Lecates v. Justice of the Peace Court No. 4,* 637 F.2d 898 (3rd Cir. 1980). In that case, after giving due consideration to this Court's decisions concerning the manner in which summary affirmances are to be regarded by lower courts, the Third Circuit, without supporting authority, stated:

> [I]ndications that there have been doctrinal developments since the summary action will relieve a lower court from the duty to adhere to a summary disposition.

Id. at 904.

However, in *Hicks v. Miranda, supra,* this Court had indicated that the doctrinal developments exception was to be applied to summary dismissals for want of a substantial federal question. No mention was made of its possible application to summary affirmances. Thus, it is not clear that the Third Circuit correctly extended the doctrinal development exception to such affirmances, and it is urged that it did not.

But assuming, arguendo, that a doctrinal development would relieve a lower court from following a summary affirmance, such a development must, of necessity, occur in this Court itself. "Needless to say, only this Court may overrule one of its precedents." *Thurston Motor Lines v. Jordan K. Rand, Ltd.,* 460 U.S. 533, 535 (1983); *See also Jaffree v. Wallace,* 705 F.2d 1526, 1532 (11th Cir. 1983), *aff'd,* — U.S. —, 105 S.Ct. 2479 (1985). Moreover, "some

clear indication that the Supreme Court would no longer follow [a] precedent . . ." is required. *Henderson v. Cronvich*, 402 F.2d 763, 764 (5th Cir. 1968).

1. *Carey v. Population Services*

For a number of reasons, the Eleventh Circuit's conclusion that *Carey's* footnotes constitute a doctrinal development is ill-founded. First, the only aspect of the right of privacy applied in *Carey* was "[t]he decision whether or not to beget or bear a child." 430 U.S. at 685. The Court repeatedly emphasized this. *Id.* at 686-88. In footnote 5, five members of the Court limited the effect of the decision to "state regulation . . . only when it 'burden[s] an individual's right to decide to prevent conception or terminate pregnancy by substantially limiting access to the means of effectuating that decision.' [cit. omitted.]" The Court expressly declined to address "state regulation . . . 'whenever it implicates sexual freedom' . . . or 'affect[s] adult sexual relations.'" *Id.* at 688 n. 5. Obviously, the aspect of privacy at issue in *Carey* did not concern homosexuals.

Second, the remark that the "outer limits" of one aspect of privacy "have not been marked by the Court," *id.* at 684-85, in no way casts doubt on the authority of *Doe v. Commonwealth's Attorney*. As Judge Kravitch observed in her dissent below, this statement "simply acknowledges the fact that the Court has not yet passed on the validity of many kinds of state statutes regulating sexual conduct," citing as an example Georgia's fornication statute. O.C.G.A. § 16-6-18 (1984); *Hardwick*, 760 F.2d at 1215 (Kravitch, J., dissenting) (Cert. App. at 32). Third, footnote 17 in *Carey* does not even remotely ad-

dress the issues sub judice. The context of that footnote was that it had been argued by those defending New York's restrictions on minors' access to contraceptives that significant state interests were served because "free availability to minors of contraceptives would lead to increased sexual activity among the young in violation of the policy of New York to discourage such behavior." *Id.* at 694. The appellees in *Carey* had argued, however, that the state's policy to discourage sexual conduct by minor's was itself unconstitutional. At that point, the Court interposed footnote 17 which merely explained that the Court was not willing to expand the right of privacy as far as had been urged by the appellees. It is difficult, at best, to see how this footnote could be interpreted as a statement by this Court that it is now an open qustion as to whether the right of privacy invalidates all state statutes regulating any kind of private sexual conduct, much less consensual homosexual sodomy.

Fourth, this Court has recently warned against over-reliance on the language contained in its footnotes. In *Wainwright v. Witt*, — U.S. —, 105 S.Ct. 844 (1985), the Court stated that its footnotes in *Witherspoon v. Illinois*, 391 U.S. 510 (1968), were only dicta and "not controlling." *Id.* at 851. *See also McDaniel v. Sanchez*, 452 U.S. 130, 141 (1981). It is urged that this observation is equally applicable here, especially where the reliance on footnotes is in derogation of a previous precedent of this Court on the merits of issues not involved in the case wherein the footnotes appear.

Perhaps a stronger argument for reliance on one of this Court's footnotes can be made where the note deals more specifically with the subject matter at hand. For

example, in *Rose v. Locke*, 423 U.S. 48, 50 n.3 (1975), a majority of this Court indicated that at least one of the activities proscribed by Georgia's statute (cunnilingus) was not a fundamental right requiring special judicial scrutiny.

2. *New York v. Uplinger*

The majority opinion below concluded that this Court's dismissal of certiorari in *New York v. Uplinger*, *supra*, provided an indication that the constitutional questions presented by Michael Hardwick are open for consideration "by the Supreme Court and by this Court." *Hardwick*, 760 F.2d at 1210. (Cert. App. at 21). While this observation may have been true as to this Court's ability to reconsider its own decisions, the majority below missed the mark as to its own ability to reject a precedent of the Supreme Court. Nonetheless, based upon the statement by this Court that the *Uplinger* case provided "an inappropriate vehicle for resolving the important constitutional issues raised by the parties," *Uplinger*, — U.S. —, 104 S.Ct. at 2334, the majority below inferred that one of the important issues was whether a right of privacy requires the invalidation of sodomy statutes, and that this Court's intention was to reverse, or at least reconsider, *Doe v. Commonwealth's Attorney*. The issues raised in *Uplinger* were vagueness, overbreadth, First Amendment, equal protection and due process. As noted by Judge Kravitch, the per curiam dismissal of the writ did not identify which of these issues were considered important. *Hardwick*, 760 F.2d at 1216 n. 10 (Kravatch, J., dissenting) (Cert. App. at 34).

Moreover, even the majority below recognized that the state court decision in *Uplinger* was subject to varying

interpretations which made it difficult to determine exactly which federal constitutional issues had been decided. *Id.* at 1210 (Cert. App. at 20). This certainly appears to be incongruent with the strong assertion of the majority below that this court was prepared in *Uplinger* to address the constitutionality of state sodomy statutes. It is suggested that the holding of this Court in *Uplinger* was that a precise federal constitutional issue could not be identified for consideration and that this was the reason for dismissing the writ of certiorari. In any event, *Uplinger* gave no indication that this Court was about to overrule *Doe v. Commonwealth's Attorney.*

3. *Other decisions*

While petitioner would not presume to suggest that this Court would in any way be impeded from reconsideration of *Doe's* summary affirmance, it seems worthy of note that many courts have expressed confidence in the validity of *Doe's* precedent since the *Carey* decision *and* the dismissal of certiorari in *Uplinger.* In *Carey* itself, Justice Rehnquist, in dissent, stated that, footnote 17 notwithstanding, *Doe v. Commonwealth's Attorney* was a definitive decision on the "facial constitutional validity of criminal statutes prohibiting certain consensual acts." *Id.* at 718 n. 2 (Rehnquist, J., dissenting). Moreover, as the Ninth Circuit observed in *Beller v. Middendorf,* 632 F.2d 788 (9th Cir. 1980), "[m]ost federal courts, on the other hand, have understood the holding [in *Doe v. Commonwealth's Attorney*] to be that homosexual conduct does not enjoy special constitutional protection under the due process clause." *Id.* at 809-10. The Ninth Circuit in *Beller* cited an impressive array of cases, which will not be repeated here, in support of this proposition.

More recently, the Court of Appeals for the District of Columbia in *Dronenberg v. Zech,* 741 F.2d 1388, *reh'g denied,* 746 F.2d 1579 (D.C. Cir. 1984) (en banc), found that *Doe* remained a binding precedent, even after full consideration of *Griswold, supra,* and its progeny, including *Carey.*

The Fifth Circuit in *Baker v. Wade,* 769 F.2d 289 *reh'g denied* 774 F.2d 1287 (5th Cir. 1985) (en banc), recently reversed a Texas district court decision invalidating a homosexual sodomy statute on privacy and equal protection grounds. The Court adopted the view stated in *Dronenberg* and by Judge Kravitch in her dissent below.

Finally, it should be noted that Judge Merhige of the Eastern District of Virginia, who filed the dissent in the original three-judge proceeding in *Doe v. Commonwealth's Attorney,* recently acknowledged its continuing efficacy in *Doe v. Duling,* 603 F.Supp. 960 (E.D.Va. 1985), stating that ". . . Virginia's sodomy statute as applied to adult males who consensually engage in homosexual sodomitic activity in privacy is a constitutional exercise of state power." *Id.* at 965 (dicta).

In summary, the majority below made unwarranted assumptions and drew prohibited inferences in its efforts to validate its rejection of *Doe v. Commonwealth's Attorney.* It is respectfully urged that the tortuous roadmap laid out by the court below enroute to its predetermined destination is too convoluted to be followed without error. The plain language of *Hicks v. Miranda,* 422 U.S. 332 (1975), lays out a much straighter path. Summary affirmances are binding on lower courts until the Supreme Court informs that they are not. *Id.* at 344-45. It is respectfully urged that this admonition has not been heeded by the majority below.

II. The Court Below Erred In Concluding That Georgia's Sodomy Statute Infringes Upon The Fundamental Rights Of Homosexuals And In Requiring The State Of Georgia To Demonstrate A Compelling State Interest In The Prohibition Of Sodomy In Order To Support The Constitutionality Of The Statute.

The majority below, once it had dispensed with *Doe v. Commonwealth's Attorney,* went on to examine the question of whether Petitioner Bowers and the other Defendants were entitled to dismissal on some ground other than the precedent of *Doe.* If it were to conclude that the sodomy statute was to be tested only by minimal judicial scrutiny, and if Hardwick could not prove that the law was not rationally related to a legitimate state purpose, the district court's dismissal could stand. *Hardwick,* 760 F.2d at 1211 (Cert. App. at 22).

The court below, however, concluded that Georgia's sodomy statute infringes on fundamental constitutional rights of Michael Hardwick, i.e., a fundamental right of privacy and a constitutionally protected right of intimate association. This conclusion goes far beyond any intimation by this Court of the extent to which the Constitution affords such protection.

A. The Right Of Privacy.

That there exists a right of personal privacy under the Constitution is not questioned by Petitioner. Though this right is not articulated textually in the Constitution, it is said to emanate from the penumbras of the First, Fourth, Fifth and Ninth Amendments, and the concept of liberty embodied in the Fourteenth Amendment. *Roe v. Wade,* 410 U.S. 113, 152 (1973), and cases cited therein.

However, the court below, in its expansive view of the right of privacy, failed to recognize the historical view of this Court that "only personal rights that can be deemed 'fundamental' or 'implicit in the concept of ordered liberty,' *Palko v. Connecticut*, 302 U.S. 319, 325 (1937), are included in this guarantee of personal privacy." *Roe*, 410 U.S. at 152.

Thus far, this Court has recognized that the right of privacy extends to activities relating to marriage, *Zablocki v. Redhail*, 434 U.S. 374 (1978); *Loving v. Virginia*, 388 U.S. 1 (1967), and other familial relationships, *Moore v. City of East Cleveland*, 431 U.S. 494 (1977); decisions relating to whether to conceive or bear a child, *City of Akron v. Akron Center for Reproductive Health*, 462 U. S. 416 (1983); *Bellotti v. Baird*, 443 U.S. 622 (1979); *Carey v. Population Services International*, 431 U.S. 678 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Eisenstadt v. Baird*, 405 U.S. 438 (1972); *Griswold v. Connecticut*, 381 U.S. 479 (1965); and child rearing and education, *Pierce v. Society of Sisters*, 268 U.S. 510 (1925). It is certainly not argued here that these zones of privacy should not be considered fundamental or implicit in the idea of ordered liberty.

However, the lower court has taken an activity which for hundreds of years, if not thousands, has been uniformly condemned as immoral, and labeled that activity as a fundamental liberty protected by the Constitution in the same manner as are the intimacies of marriage. The court below finds strength for this conclusion in the fact that the activity in this case is alleged to occur in Hardwick's home between consenting adults.

While the right of privacy may have its aegis in the penumbras of the Bill of Rights or the due process clause of the Fourteenth Amendment, there must, at some point, be some basis for cataloging a particular activity under the protection of that right. No such basis exists for adding the crime of sodomy to the list of fundamental rights thus far recognized by this Court.

Obviously, there is no textual support in the Constitution or laws of the United States for the proposition that sodomy is a protected activity. Nor can it be said that the lower court's reasoning was based on some absolute truth or ethic engrained in American philosophy and which rises above the Constitution. It simply cannot be said that the lower court's decision was based upon the Natural Law referred to by Jefferson in the Declaration of Independence. No universal principle of morality teaches that homosexual sodomy is acceptable conduct. To the contrary, traditional Judeo-Christian values proscribe such conduct. Indeed, there is no validation for sodomy found in the teaching of the ancient Greek philosophers Plato or Aristotle.[2] More recent thinkers, such as Immanuel Kant, have found homosexual sodomy no less unnatural.[3]

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[2]Plato, *Laws*, 636 C quoted in R. Reilly, *Homosexual Rights and The Foundations of Human Rights*, infra n. 20; ("The intercourse of men with men, or of women with women, is contrary to nature, and . . . the bold attempt was originally due to unbridled lust.") *See also* Aristotle, *Nicomachean Ethics*, VII, 5:1-3, 1148(b), 15-30 (Oxford trans.), M. Hamburger, *Morals and Law, The Growth of Aristotle's Legal Theory*, 87 (1951).

[3]I. Kant, *Lectures on Ethics*, 170 (L. Infield trans. 1963).

Nor can it be said that support for the lower court's conclusion may be found in the legal traditions of our society. Justice Powell, in *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), identified tradition as a pedigreed guide to the identification of fundamental rights. To find this tradition and the roots of modern conventional morality and law relative to the crime of sodomy, only a brief historical review is necessary. Sodomy was proscribed in the laws of the Old Testament (Leviticus 18:22) and in the writings of St. Paul (Romans 1:26, 27; 1 Corinthians 6:9, 10). Sodomy was a capital crime in ancient Rome under the Theodosian law of 390 A.D.[4] and under Justinian.[5] Sodomy was proscribed by the teachings of St. Thomas Aquinas.[6] Sodomy was prosecuted as heretical in the ecclesiastical courts throughout the Middle Ages.[7] During the English Reformation when powers of the ecclesiastical courts were transferred to the King's courts, the first English statute criminalizing sodomy was passed.[8]

In the first half of the 17th Century, Lord Coke expounded upon the crimes of buggery and sodomy, noting

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[4]D. Bailey, *Homosexuality in the Western Christian Tradition* 70-81 (1975).

[5]Bailey, *supra* n.4, at 73-75, *quoting* Justinian, *Novellae* 77, 141.

[6]Summa Theologica II-II, Q Cliv. I, II and XII. D. Richards, *Unnatural Acts and the Constitutional Right to Privacy*, 45 Fordham L. Rev. 1281, 1296 (1977).

[7]*See* W. Barnett, *Sexual Freedom and the Constitution* 80-81 (1973); Bailey, *supra* n.4, at 135; and D. Richards, *supra* n.6 at 1296-97.

[8]25 Hen. VIII, c.6 (1533) (repealed by 9 Geo. IV 31 (1828)); *see also* 5 Eliz. I, c.17 (1562). *See* Barnett, *supra* n.7, at 81.

that the "ancient authors doe conclude, that it deserveth death, *ultimum supplicium,* though they differ in the manner of punishment."[9] Blackstone considered "the infamous crime against nature" as an offense of "deeper malignity" than rape, and an act so heinous, "the very mention of which is a disgrace to human nature," "a crime not fit to be named."[10]

Coke's *Institutes* and the *Commentaries* were studied by colonial lawyers in America. The popularity of Coke in the colonies and the significance of that popularity was recognized by this Court in *Payton v. New York,* 445 U.S. 573, 594 n. 36 (1980). Two thousand five hundred copies of the *Commentaries* were sold in America before the Revolution, and a subscription reprint was published in Philadelphia between 1771 and 1772. "John Adams, Esq., Barrister at Law, Boston, Massachusetts Bay," was among the subscribers.[11]

In Georgia, the common law of England in force prior to May 14, 1776, was adopted as the law of the state by an act of the General Assembly approved February 25, 1784 (Prince's 1837 Digest 570; *see also* Cobb's 1851 Digest 720).

In 1816, the crimes of sodomy and bestiality were made punishable in Georgia by life imprisonment at hard

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[9]Coke, *Third Part of the Institutes of the Laws of England* at 58-59 (Brooke ed. 1797).

[10]4 W. Blackstone, *Commentaries* 215.

[11]R. Pound, *The Development of Constitutional Guarantees of Liberty* 61 (1957).

labor (Lamar's Laws of Georgia, 1810-1819, at 571, § 35) and have continuously been statutory crimes ever since.[12]

While Respondents correctly note that 22 states have legislatively decriminalized homosexual sodomy (Brief in Opposition to Petition for Certiorari at 12, n. 6), 25 states and the District of Columbia continue to maintain criminal statutes against this conduct.[13] New York and Pennsylvania have judicially decriminalized homosexual sodomy. *People v. Onofre*, 51 N.Y.2d 476 (1980); *Commonwealth v. Bonadio*, 490 Pa. 91, 415 A.2d 47 (1980). Thus, neither the legal nor moral traditions of this nation can provide the necessary support for the recognition of consensual sodomy as falling within that class of rights deemed fundamental or implicit in the concept of ordered liberty. Tradition provides no basis for protecting this activity under the guise of a right of privacy.

One other possible source of authority for judicial recognition of a fundamental right of privacy to engage in homosexual sodomy is the "consensus rationale" discussed by some legal scholars. *See, e.g.*, Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 Yale L.J. 221, 243-49

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[12]Ga. Laws 1833, Cobb's Digest, 1851, p. 787; Code 1863, §§ 4251, 4252; Code 1868, §§ 4286, 4287; Code 1873, §§ 4352, 4353; Code 1882, §§ 4352, 4353; Penal Code 1895, §§ 382, 383; Penal Code 1910, §§ 373, 374; Code 1933, §§ 26-5901, 16-5902; Ga. Laws 1949, p. 275, § 1; Code 1933, § 26-2002, enacted by Ga. Laws 1968, p. 1249, § 1.

[13]Alabama, Arizona, Arkansas, District of Columbia, Florida, Georgia, Idaho, Kansas, Kentucky, Louisiana, Maryland, Massachusetts, Michigan, Minnesota, Missouri, Montana, Nevada, North Carolina, Oklahoma, Rhode Island, South Carolina, Tennessee, Texas, Utah, and Virginia; J. Lorence, *Sodomy Laws, Right of Privacy and the Courts*, printed in Magnusen, *Are Gay Rights Right? A Report on Homosexuality and the Law* 83-90 (1985).

(1973). A review of the decision below excludes this theory as a possible basis. The Court below did not disclose any consensus of thought in this nation which contradicts the legislative judgment of the General Assembly of Georgia concerning the moral or other reasons for prohibiting sodomy.

While the court below attempted to use this Court's prior decisions on the right of privacy as a basis for its opinion, it did so without any deference to their subject matter context, and it failed to give any effect whatsoever to this Court's indication in *Rose v. Locke*, 423 U.S. 48, 50 n.3 (1975), that the act of cunnilingus is not considered to involve a fundamental right. Rather, the court below found that homosexual sodomy was protected by the Ninth Amendment and the Fourteenth Amendment's concept of liberty. *Hardwick*, 760 F.2d at 1212 (Cert. App. at 26).

The Ninth Amendment's guarantee that "[t]he enumeration in the Constitution of certain rights shall not be construed to deny or disparage others retained by the people" was, as Justice Goldberg observed in *Griswold*, a recognition by the framers that fundamental rights exist which are not enumerated in the first eight amendments, and that these unenumerated rights should be protected. Obviously, since these rights are unenumerated, if they are to be protected they must first be identified. The same, of course, is true for those fundamental liberties protected by the Fourteenth Amendment but not specifically enunciated in the Bill of Rights. In performing this task of identifying which rights are fundamental, Justice Goldberg instructed that:

> . . . judges are not left at large to decide cases in light of their personal and private notions. Rather, they must look at the "traditions and [collective] conscience of our people' to determine whether a principle is 'so rooted [there] . . . as to be ranked as fundamental." *Snyder v. Massachusetts*, 291 U.S. 97, 105. . . .

Griswold, 381 U.S. at 493 (Goldberg, J., concurring).

The court below has ignored the traditions and collective conscience of this nation. By concluding that homosexual sodomy, for some, serves the same purpose as the intimacy of marriage, *Hardwick*, 760 F.2d at 1212 (Cert. App. at 24), it has lowered the estate of marriage, which has traditionally been held an institution worthy of the protection and nurture of the State, to merely another alternative for sexual gratification. This court in *Zablocki v. Redhail*, 434 U.S. 374 (1978) recognized marriage as the "foundation of the family and of society, without which there would neither be civilization nor progress. . . ." *Id.* at 384, *quoting Maynard v. Hill*, 125 U.S. 190, 211 (1888). Marriage and the family are certainly within a zone of privacy which did, at the time the Constitution was ratified, and does now, transcend the enumerated rights. The common principles of this Court's privacy decisions have revolved around marriage, the family, the home and decisions as to whether through procreation the ancient cycles will begin again and, if so, in what manner the new generation will be brought up. These rights have always been with us, and are part of us. Sodomy is not now and has never been a right, fundamental or statutory, in existence to be "retained by the people" under the Ninth Amendment. Nor can it be said that sodomy was considered to be an unenumerated but inherent liberty recog-

nized at the time the Fourteenth Amendment became part of the law of this land. It is not a part of our traditional values or conventional morality.

B. Homosexual Sodomy Is Not Protected By The Home.

The court below attempts to bolster its conclusion with the observation that Hardwick intends to commit sodomy in his home, citing *Payton v. New York*, 445 U.S. 573, 589-90 (1980), and *Stanley v. Georgia*, 394 U.S. 557 (1969). *Payton* held unconstitutional the *physical* entry into private residences to effect routine felony arrests in the absence of warrants, exigent circumstances, or consent. While *Payton* does recognize the importance of the home as a situs in which an individual may be free from unreasonable governmental intrusion, this Court made it quite clear that the home was not an inviolable haven for crime or criminals. As Justice Harlan noted in his dissent in *Poe v. Ullman*, 367 U.S. 497 (1961):

> . . . [I]t would be an absurdity to suggest either that offenses may not be committed in the bosom of the family or that the home can be made a sanctuary for crime. The right of privacy most manifestly is not absolute. Thus, I would not suggest that adultery, homosexuality, fornication, and incest are immune from criminal inquiry, however privately practiced. So much has been explicitly recognized in acknowledging the state's rightful concern for its peoples' moral welfare. See 367 U.S. at pp. 545-548, *supra*.

Id. at 552-53 (Harlan, J., dissenting).

Stanley, supra, held simply that the First and Fourteenth Amendments prohibit making the private possession of obscene material in one's home a crime. However,

the basis for the Court's opinion was rooted in the First Amendment right to receive information and ideas and the absolute prohibition, founded in the First Amendment, against attempts by the government to control the moral content of a person's thoughts.

Georgia's sodomy statute does not purport to control men's minds or inhibit their freedom of expression. It is directed toward an act which is in itself immoral. Even so, the Court has clearly indicated that where "speech" or the expression of ideas involves the commission of *acts* the scope of permissible regulation by the state significantly increases. In *United States v. O'Brien,* 391 U.S. 367 (1968), the Court declined to accept the notion that conduct is always protected "speech" whenever the person intends thereby to express an idea. *See also California v. LaRue,* 409 U.S. 109, 117, 118 (1972); *Miller v. California,* 413 U.S. 15, 26 n.8 (1973); *Brandenburg v. Ohio,* 395 U.S. 444, 447 (1969). It is submitted that homosexual sodomy as an act of sexual deviancy expresses no ideas. It is purely an unnatural means of satisfying an unnatural lust, which has been declared by Georgia to be morally wrong.

The reason *Stanley* is inapplicable here is that sodomy does not enjoy the status of a fundamental right. While individuals are free to live and make fundamentally private decisions in their homes concerning marriage, procreation, child rearing, education, and indeed, the content of one's own library and his most personal thoughts, other activities which are not fundamental rights, but which might also take place in the home, are not and cannot be free from proper regulation. Otherwise, the states would

be unable to meet their obligations under the police power in a myriad of circumstances. As Chief Justice Burger pointed out in *Paris Adult Theater I v. Slaton,* 413 U.S. 49, 68 n.15 (1973), there are numerous laws prohibiting such acts as prostitution, suicide, voluntary self-mutilation, and bigamy which are practiced by or among consenting adults, more often than not in secret. Under the Eleventh Circuit's rationale, perhaps none of these actions could be reached by the State if they perchance occur within the confines of someone's home.

It is not so much the place where any given activity occurs that determines whether the activity is protected as a fundamental right as it is the nature of the activity itself. This is not to say that the people are not entitled to look upon their home as their "castle" and be secure there from unreasonable governmental intrusion. The Fourth Amendment articulates this fundamental right. *Payton, supra; Stanley* 94 U.S. at 569-76 (Stewart, J., concurring). Petitioner has no quarrel, of course, with the principles enunciated by the Fourth Amendment or this Court's interpretations of that part of our constitution. The citizens' rights under the Fourth Amendment are quite properly "fundamental." However, those activities which are not specifically protected under the Constitution, and which do not fall within those zones of privacy thus far enunciated by this Court, should not be protected, necessarily, by an arbitrary delineation of privacy at the front doorstep of an individual's house. The right of privacy in the home is not absolute. *Poe v. Ullman,* 367 U.S. 497, 552 (Harlan, J., dissenting).

Justice Blackmun recognized in *Roe v. Wade,* 410 U.S. 113, 154 (1973), that there are limits on the right of privacy

and indicated that lines must be drawn in recognition of those limits. Where the nature of the activity is examined to determine whether it is deserving of constitutional protection as a fundamental right of privacy based upon the traditions of our society, then the line marking the limits undoubtedly will be properly drawn. But where, as in the court below, the nature of the activity is disregarded, and the activity is deemed fundamental only because of where it takes place, the line becomes a gerrymandered scrawl.

C. Homosexual Sodomy Is Not Protected By A Constitutional Right Of Association.

The court below found that the conduct Hardwick engages in is "quintessentially private and lies at the heart of an intimate association beyond the proper reach of state regulation," and placed homosexual sodomy, at least for some, on the same plane as the intimacies of marriage. *Hardwick*, 760 F.2d at 1212 (Cert. App. at 24). Again, the lower court has made an inferential leap well beyond any previous delineations marked by this Court.

In *Moore v. City of East Cleveland*, 431 U.S. 494 (1977), this Court struck down on due process grounds an ordinance which limited the occupancy of a dwelling to members of a single family composed of only a few categories of related individuals. The Court distinguished its previous decision in *Village of Belle Terre v. Boraas*, 416 U.S. 1 (1974), which upheld an ordinance limiting occupancies to traditional families or to groups of not more than two unrelated persons, solely on the ground that the *Belle Terre* ordinance affected unrelated individuals. It allowed occupancy by all who were related by blood, adoption, or marriage.

Justice Powell, writing for the plurality in *Moore*, recognized the right of individuals to be free from governmental intrusion in decisions relating to marriage and family life, and used as a guide the teachings of history and the basic values of society to conclude that the Constitution protects the sanctity of the family, even the extended family, "precisely because the institution of the family is deeply rooted in this nation's history and tradition. It is through the family that we inculcate and pass down many of our most cherished values, moral and cultural." *Moore*, 431 U.S. at 503-04. There are no inconsistencies between *Moore* and *Belle Terre, supra*. Together they mark a limitation on the right of privacy and intimate association in the realm of cohabitation to that of the family.

In their brief in opposition to the writ of certiorari, however, Respondents relied on this Court's recent decision in *Roberts v. United States Jaycees*, — U.S. — , 104 S.Ct. 3244 (1984), wherein this Court held that the associational freedoms asserted by the Jaycee organization were not sufficient to preclude application of the Minnesota Human Rights Act. Of course, under the act and this Court's decision, the organization was required to accept women in its membership. The type of associational interest most directly involved in *Roberts* was quite clearly that relating to the right to associate for expressive, First Amendment, purposes. *See, e.g., Gilmore v. City of Montgomery*, 417 U.S. 556, 575 (1974). However, it was concluded by this Court that even that kind of associational freedom is not absolute, and may be infringed upon for compelling state interests. *Roberts*, — U.S. at — , 104 S.Ct. at 3252.

The associational interests claimed by Michael Hardwick are quite dissimilar to those asserted by the United States Jaycees or the interests discussed by Justice Brennan in Part II A of the *Roberts* opinion. After discussing the importance of protecting certain personal relationships because of their "critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs . . ." and the "realization that individuals draw much of their emotional enrichment from close ties with others," *id.* at — , 104 S.Ct. at 3250, Justice Brennan stated that:

> [t]he personal affiliations that exemplify these considerations, and *that therefore suggest some relevant limitations on the relationships that might be entitled to this sort of constitutional protection* are those that attend the creation and sustenance of a family-marriage, e.g., *Zablocki v. Redhail, supra; childbirth,* e.g., *Carey v. Population Services, Int'l, supra;* the raising and education of children, e.g., *Smith v. Organization of Foster Families, supra* [431 U.S. 816 (1977)] and cohabitation with one's relatives, e.g., *Moore v. City of East Cleveland, supra. Family* relationships, by their nature, involve deep attachments and commitments to the necessarily few other individuals with whom one shares not only a special community of thoughts, experiences, and beliefs but also distinctively personal aspects of one's life. . . . Only relationships with these sorts of qualities are likely to reflect the considerations that have led to an understanding of freedom of association as an intrinsic element of personal liberty.

Id. at —, 104 S.Ct. at 3250-51 (emphasis added).

Georgia's sodomy statute does not infringe on any of these values. It applies exclusively to an act found by the General Assembly of Georgia to be immoral. It does

not impact upon an individual's First Amendment freedom to cultivate and transmit even unpopular ideas or political doctrines. It does not tell individuals who their friends may or may not be, or with whom they may spend their time, worship, work, or engage in legitimate yet personal discourse. The statute most certainly does not interfere with personal decisions concerning marriage or family life, the raising of children or their education, or which members of a family will be permitted to live together.

There are and must be limits upon this right of intimate association, as Justice Brennan indicated. Otherwise, a multiplicity of areas in which the states and the national government have exercised regulatory power would be removed from regulation under the guise of association. Perhaps polygamy is the best example. In *Reynolds v. United States,* 98 U.S. 145 (1878), this Court upheld a congressional enactment making bigamy a crime in the territories. The Court noted that polygamy was historically abhorred in northern and western Europe and that at common law a second marriage was void. The Court recounted the ecclesiastical prosecutions in England for this crime and the post-reformation English statutory treatment, noting that the penalty was death. The Court traced this crime through colonial times to the time of that opinion. Against the claim that polygamy was a valid free exercise of religion, the Court found that "laws are made for the governance of actions, and while they cannot interfere with mere religious belief and opinions, they may with practices." *Id.* at 166. But perhaps more important than this was the Court's reasoning as to the justification for polygamy statutes. The Court noted that traditional

marriage is the bedrock of society, the essential and elementary unit upon which even government depends. Polygamy, the Court concluded, would upset the necessary balance provided by the traditional entity, to the general detriment of society. The protection of the "organization of society" was found valid against contrary religious views. Otherwise, the Court specifically noted, religious beliefs would subjugate the law, and permit each individual to become a law unto himself. *Id.* at 167. *Cf. Bob Jones University v. United States,* 461 U.S. 574, 603 (1983); *Zablocki v. Redhail,* 434 U.S. 374, 384 (1978). *See also Potter v. Murray City,* 760 F.2d 1065 (10th Cir. 1985).

Respondents claim that Hardwick's associational interest, wrapped in the lower court's privacy analysis, precludes Georgia from prohibiting sodomy as an act. This errant logic would lead to the conclusion that polygamy may not be prohibited. Certainly, the elements of an "association" of individuals are present in polygamy. Aside from possible religious justifications, it could also be argued that polygamy might provide the source of certain "emotional enrichment," *Roberts, supra,* — U.S. at — , 104 S.Ct. at 3250. It could also be argued that the benefits of "intimate association" may be present in consensual incest. It could be said that for some, liaison with prostitutes, commercial aspects notwithstanding, provide a similar sexual experience to that of marriage. Indeed, the same could be said for adultery or fornication. However, none of these activities, nor any associational aspects relating to them, can be said to have "played a critical role in the culture and traditions of the Nation by cultivating and transmitting shared ideals and beliefs . . ." fostering

diversity or "act[ing] as critical buffers between the individual and the power of the state." *Id.* at 3250.

It is, therefore, submitted that homosexual sodomy does not fall within those categories of activities protected by a right of intimate association or a more general fundamental right of privacy. Since no fundamental right is involved, all that need be shown by the State of Georgia is that the statute is not arbitrary and bears a "rational relationship" to a legitimate state purpose. *Compare Village of Belle Terre v. Boraas,* 416 U.S. at 8, *with Roe v. Wade,* 410 U.S. at 155. Thus, the Eleventh Circuit erred in imposing the "compelling state interest" standard of review on Georgia's sodomy statute.

D. Considerations Of Federalism: Traditional Morality And Other Legitimate State Interests.

Respondents would have this Court strike morality from the legitimate areas in which the States may act. Yet this Court and other federal courts have many times held that morality and decency constitute legitimate and compelling state interests. *Paris Adult Theater I v. Slaton,* 413 U.S. 49 (1973); *Eisenstadt v. Baird,* 405 U.S. 438 (1972); *Near v. Minnesota,* 283 U.S. 697, 716 (1931); *Doe v. Commonwealth's Attorney, supra; Dronenberg v. Zech,* 741 F.2d 388, *reh'g denied,* 746 F.2d 1579 (D.C. Cir. 1984); *Baker v. Wade,* 769 F.2d 289, *reh'g denied,* 774 F.2d 1287 (5th Cir. 1985) (en banc).

In *Noble State Bank v. Haskell,* 219 U.S. 104 (1910), Justice Holmes, in expounding upon the police power of the States, stated as follows:

> It may be said in a general way that the police power extends to all the great public needs. *Camfield v. United States,* 167 U.S. 518. It may be put forth in aid of what is sanctioned by usage, or held by the prevailing morality or strong and proponderant opinion to be greatly and immediately necessary to the public welfare.

Id. at 111. More recently, Justice Douglas stated that "[p]ublic safety, public health, morality, peace and quiet, law and order — these are some of the more conspicuous examples of the traditional application of the police power to municipal affairs. Yet they merely illustrate the scope of the power and do not delimit it." *Berman v. Parker,* 348 U.S. 26, 32 (1954) [citing *Noble State Bank, supra*].

As Justice Powell has stated, "the State, representing the collective expression of moral aspirations, has an undeniable interest in insuring that its rules of domestic relations reflect the widely held values of its people." *Zablocki v. Redhail,* 434 U.S. 374, 399 (1978) (Powell, J., concurring). In *Paris Adult Theater I,* 413 U.S. 49 (1973), Chief Justice Burger recognized that "there is a 'right of the nation and of the States to maintain a decent society. . . .'" *Id.* at 60-61, *quoting Jacobellis v. Ohio,* 378 U.S. 184, 199 (1964) (Warren, C.J., dissenting). Moreover, the Court in *Paris Adult Theater I* made it clear that it is not for the judiciary to decide "empirical uncertainties" concerning state legislation, except where the Constitution plainly provides protection for a fundamental right. The Court expressly found that legitimate "unprovable assumptions" may be acted upon by both the courts and legislatures in order to protect social interests in morality. *Id.* at 60-61. Following this reasoning, the district

court in *Doe v. Commonwealth's Attorney* concluded Virginia was not required to show that moral delinquency actually results from homosexuality, but that the conduct would be likely to contribute to moral delinquency. In Georgia, it is the very act of homosexual sodomy that epitomizes moral delinquency. This is a choice which has been made by the representatives of the people of this State, based upon the traditional moral values of society. A similar choice was made by Congress in its decision to exclude homosexual aliens. *See Boutilier v. Immigration and Naturalization Service,* 387 U.S. 118 (1967).

The Court of Appeals for the Fifth Circuit has recently stated that moral issues should be resolved by the people and not by the federal judiciary. *Baker v. Wade,* 774 F.2d 1287 (en banc), *denial of rehearing in* 769 F.2d 289 (5th Cir. 1985). *See also Dronenberg v. Zech,* 741 F.2d 1388, 1397 (D.C. Cir. 1984). If morality is a legitimate state purpose, the identification of that morality, "the widely held values" of the people, should be voiced through their representatives. The legislative process is acutely designed for this purpose, whereas the judiciary may be inclined to make determinations based upon more empirical evidence, to which this area is not particularly amenable. *See Paris Adult Theater I, supra.* For example, it should be permissible for the General Assembly to find as legislative fact that homosexual sodomy leads to other deviate practices such as sado-masochism, group orgies, or transvestism, to name only a few.[14] Homosexual sodomy is often practiced outside the home such as in public parks, rest-

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[14]K. Jay and A. Young, *The Gay Report* 563-64. (Summit 1979).

rooms, "gay baths," and "gay bars"[15] and is marked by the multiplicity and anonymity of sexual partners,[16] a disproportionate involvement with adolescents,[17] and, indeed, a possible relationship to crimes of violence.[18] Similarly, the legislature should be permitted to draw conclusions concerning the relationship of homosexual sodomy in the transmission of Acquired Immune Deficiency Syndrome (AIDS) and other diseases such as anorectal gonorrhea, Hepatitis A, Hepatitis B, enteric protozoal diseases, and Cytomegalovirus,[19] and the concomitant effects of this relationship on the general public health and welfare.

But perhaps the most profound legislative finding that can be made is that homosexual sodomy is the anathema of the basic units of our society — marriage and the family. To decriminalize or artificially withdraw the public's expression of its disdain for this conduct does not uplift sodomy, but rather demotes these sacred institu-

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[15]Jay and Young, *supra* note 14, at 500-501.

[16]A. Bell & M. Weinberg, *Homosexuality: A Study of Diversity Among Men and Women* 309 (1978).

[17]Jay & Young, *supra* note 14, at 275.

[18]Cameron, *Report on Homosexuality and Murder, Institute for the Scientific Investigation of Sexuality* (1984); as a possible example, *see Conklin v. State*, 254 Ga. 558, — S.E.2d — (1985).

[19]Landesman, et al., "Special Report: The AIDS Epidemic," 312 New Eng. J. Med. 521 (Feb. 21, 1985); Babb, "Sexually Transmitted Infections in Homosexual Men," Post Grad Med. J., No. 3 at 215, 216 (1979); Handsfield, "Sexually Transmitted Diseases in Homosexual Men," 71 Am. J. Pub. Health 989 (1981); Corey & Holmes, "Sexual Transmission of Hepatitis A in Homosexual Men," 302 New Eng. J. Med. 435, 437 (1980); William, "The Sexual Transmission of Parasitic Infections in Gay Men," 5 J. Homosexuality, 291, 292 (1980); Lange, et al., "Cytomegalovirus Isolation from Healthy Homosexual Men," 252 J.A.M.A. 1908, 1910 (1984).

tions to merely other alternative lifestyles. One author has described that result as the promotion of indifference toward these foundations of social order, where historically there has been endorsement. "Since that endorsement was purported to be based upon knowledge of the objective good of marriage, it taught not only that marriage was good, but that we can know what is good. The latter is, in a way, a far more critical lesson."[20] *See also Moore v. City of East Cleveland,* 431 U.S. at 503-04; *Zablocki,* 434 U.S. at 385-86.

Justice Douglas said marriage "is an association that promotes a way of life, not causes. . . ." *Griswold,* 381 U.S. at 486. If the legal distinctions between the intimacies of marriage and homosexual sodomy are lost, it is certainly possible to make the assumption, perhaps unprovable at this time, that the order of society, our way of life, could be changed in a harmful way. The states have a legitimate and, it is submitted, compelling interest in the protection of the organization of society. *See Reynolds v. United States, supra.*

The court below, however, has obliterated that distinction through the judicial creation of a new fundamental right. It has gone beyond the text of the Constitution or the penumbras of the Bill of Rights. It would, without any adherence to the traditions, historical values of our nation, or the contemplations of the Constitution's framers, hold the will of the people of Georgia at bay. It has recited Fourteenth Amendment "liberty" but has bowed

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[20]R. Reilly, *Homosexual Rights and the Foundations of Human Rights,* reprinted in Rueda, *The Homosexual Network,* (1982) from "Family Policy Insights" (Dec. 10, 1981).

to the temptation Justice Holmes warned against in *Lochner v. New York,* 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting) by placing its opinion above that of the representatives of the people without the support of "fundamental principles as they have been understood by the traditions of our people and our law." *Id.* at 76 (Holmes, J., dissenting).

Petitioner does not dispute this Court's power to define emerging rights under the Fourteenth Amendment or the Ninth Amendment. But such rights must be rooted in the traditions and moral values of our people. These values cannot be subjected to deliberate change by judicial action, although the contours of these values may develop over the course of time by the people themselves. Adherence to these values supplies the necessary stability in the formulation of constitutional doctrine under the Fourteenth Amendment and avoids unnecessary strains in our federalism. Such an approach precludes the appearance of a unilaterally imposed modification to the social contract and gives due regard for the collective will of the people. This has not been done by the Eleventh Circuit in this case.

CONCLUSION

As indicated above, Petitioner does not contest that Liberty embodies certain inherent rights not enunciated in the Constitution, or that these rights are protected by the Ninth or Fourteenth Amendments. But, as Judge Learned Hand once said, liberty ". . . is not the ruthless, the un-

bridled will; it is not freedom to do as one likes. That is the denial of liberty and leads straight to its overthrow." Hand, *The Spirit of Liberty* 189-90 (Dillard ed. 1952). Rather, true liberty can be found in the traditions and conscience of our people.

The tradition and conscience of the people of Georgia have been expressed in Georgia's sodomy statute. This conscience draws the necessary distinction between liberty and licentiousness, a distinction left utterly unobserved by the court below. For the reasons stated above, the judgment and order of the Court of Appeals should be reversed.

Respectfully submitted,

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